5-3100-8530-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

William J. Arenz,

Petitioner,

v.

City of Minneapolis,

Respondent.

RECOMMENDED ORDER
ON MOTION TO DISMISS

The above-entitled matter was assigned to Administrative Law Judge Howa L. Kaibel, Jr., pursuant to a Notice of Petition and Order for Hearing filed January 24, 1994. The record closed on Cross-Motions for Summary Dispositio on May 9, 1994, upon receipt of the last Supplemental Memorandum.

Jesse Gant, III, Attorney at Law, Grain Exchange Building, 400 South 4t Street, Suite 915, Minneapolis, Minnesota 55415, appeared on behalf of the Petitioner. C. Lynne Fundingsland, Assistant City Attorney, 300 Metropolita Centre, 333 South 7th Street, Minneapolis, Minnesota 55402, appeared on beha of the Respondent.

NOW, THEREFORE, based upon all of the files, records and proceedings herein,

IT IS HEREBY RECOMMENDED: that the Commissioner of Veterans Affairs DISMISS Petitioner's petition on the grounds that he is estopped from asser that he was removed from his employment by Respondent.

Dated this 6th day of June, 1994.

/s/ Howard L. Kaibel, Jr.
HOWARD L. KAIBEL, JR.
Administrative Law Judge

MEMORANDUM

Summary Disposition

Summary disposition is the administrative equivalent to summary judgmer and the same standards apply. Minn. Rules, pt. 1400.5500K. Summary judgmer is appropriate where there is no genuine issue as to any material fact and t moving party is entitled to judgment as a matter of law. Sauter v. Sauter, N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 66 (Minn. App. 1985); MRCP 56.05 (1984)

In a motion for summary disposition, the initial burden is on the movir party to show facts that establish a prima facia case and assert that no material issues of fact remain for hearing. Theile v. Stich, 425 N.W.2d 580 583 (Minn. 1988). Once the moving party has established a prima facia case burden shifts to the nonmoving party. Minnesota Mutual Fire and Casualty v Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990). To successfully resist a mot for summary disposition, the nonmoving party must show that there are specif facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid-America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986) General averments are not enough to meet the nonmoving party's burden under MRCP 56.05. Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App 1988). However, the evidence introduced to defeat a summary judgment motion need not be admissible trial evidence. Carlisle at 715 (Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Facts

The Petitioner was accused by his step-daughter on May 14, 1974 of rapi her. A subsequent examination confirmed the presence of semen and Petitione was quoted in the report of the New Hope investigating officers as claiming that he was drunk at the time and thought it was his wife. Petitioner was a employee of Respondent's police department, which investigated the allegatio to determine whether he had conducted himself in a manner unbecoming of a police officer. The police chief decided to discharge Petitioner and met wi him on June 10, 1974 to inform him of the decision. The Petitioner decided instead at the meeting to resign his position for "personal reasons". Pursu to Petitioner's subsequent request for reinstatement dated July 25, 1975, th Minneapolis Civil Service Commission conducted a hearing on January 27, 1976 explore Petitioner's contention that he was coerced into involuntarily resigning. After an exhaustive hearing where Petitioner was represented by counsel, the Commission concluded:

> That the employee executed his written resignation on June 10, 1974 of his own free will and volition. Said resignation was not coerced or otherwise wrongfully obtained by the police department.

The decision of the Civil Service Commission was subsequently appealed to an upheld by the Hennepin County District Court. Petitioner did not appeal thi judgment of the District Court. The Petitioner herein renews his contention that his resignation was coerced, seeking back wages and benefits for the la 20 years, as a consequence of Respondent failing to inform him of his vetera preference rights.

Collateral Estoppel

Respondent contends that the Petition must be dismissed because Petitio is collaterally estopped from relitigating the voluntariness of his resignation. Respondent asserts correctly that the determination in the Civ Service Commission decision meets all five elements of collateral estoppel a set down by the Minnesota Supreme Court in Graham v. Special School Distric No. 1, 472 N.W.2d 114, 116 (Minn. 1991):

1. The issue must be identical to the issue determined in the prior adjudication.

2. The issue must have been necessary to the prior agency determination.

3. There must be a final adjudication on the merits that was subject to judicial review.

4. The estopped party was a party in the prior adjudication, or in privity with a party in that adjudication.

5. The estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

The Graham case is discussed at greater length in another recent vetera affairs case recommending dismissal of a petition alleging coerced resignati in Williams v. MWCC, OAH Docket No. 8-3100-8150-2 (Filed September 1993, Finance and Commerce October 29, 1993.) Judge Lunde's observations in that decision are equally applicable here:

> As noted in Graham, collateral estoppel is a "flexible doctrine" and in each case it must be determined if its application would work an injustice on the party against whom it is asserted. In this case, the Administrative Law Judge is persuaded that applying res judicata or collateral estoppel principles to the issue Petitioner seeks to raise works no injustice on the Petitioner but would, in fact, preserve judicial and administrative resources, avoid potentially conflicting results, and further interests of comity.

It is clear from a review of the transcript of the hearing before the Minneapolis Civil Service Commission in 1976 that Petitioner received a ful and fair hearing on the precise issue he seeks to raise again here, obtainin final adjudication on the merits which was subject to judicial review. Moreover, the decision was reviewed judicially and affirmed on appeal. It i clear from a review of the transcript that nothing would be gained by

attempting to rehear the same testimony 18 years later, subpoenaing the poli
chief and his administration assistant from retirement in Bentonville, Arka
and Hackensack, Minnesota. There is nothing to suggest that their
recollections would be any sharper or differ in any way from their testimony
given on examination and cross-examination 18 years ago.

It is hard to conceive of a more appropriate case for application of th principles of collateral estoppel. It is accordingly respectfully recommend that Respondent's Motion be granted.

Petitioner's Motion

There is no need to reach the merits of Petitioner's Motion for Summary Disposition, and it would consequently be injudicious to discuss them at len here. However, in the event that the issues raised by that Motion are considered subsequently by the Commissioner or reviewing courts without rema a few cautionary observations are appropriate.

To begin with, it is clear from a review of the transcript and exhibits that Petitioner did not resign out of fear of being involuntarily discharged He testified repeatedly on cross-examination and on recross-examination that could not even recall the chief threatening to discharge him if he did not resign. The Petitioner was clearly motivated to resign solely out of concer over adverse publicity--a concern that was shared by his wife and by Respondent. It is clear from the testimony that the Petitioner understood t he had a right to a show cause hearing on any involuntary termination and th he was familiar with the process. He resigned because he wished to avoid th publicity that would be attendant upon such a hearing.

Respondent's personnel rules provided for a period of grace for up to t days for reconsideration of a voluntary resignation. Petitioner actively considered withdrawing his decision during this period and discussed it with his wife who vigorously opposed any attempt to reconsider the resignation because of the publicity:

> My kids didn't even want this to get out. . . . People had locked their doors. They didn't know if it was true or not. . . . All I can remember is -- all I know is I just wanted him to resign. I didn't want none of this to get out. (Commission hearing transcript at 49 and 50.)

Secondly, the cases cited in Petitioner's briefs should be reviewed, as they do not necessarily stand for the principles enunciated therein. Sarja IRRR, 144 N.W.2d 377 (Minn. 1966), for example, is not a veterans preference case as Petitioner's May 3, 1994 brief alleges and the court did not hold th informing an employee of a discharge is the same as coercing a resignation. Sarja was a Jobs and Training, unemployment compensation decision, which hel that the employee was disqualified from receiving benefits under a statutory exception relating to discharges for "misconduct." It construed the excepti as including suspensions for misconduct and concluded that the employee voluntarily assumed the suspension by engaging in the misconduct.

Similarly, Myers v. Oakdale, 397 N.W.2d 424 (Minn. App. 1987) (not 197
indicated in the citation) did not hold as alleged in the brief, "that all
employer has to do is communicate to the employee that his services were no
longer desired nor required, to constitute involuntary discharge instead of
voluntary resignation." Myers upheld a decision of an Administrative Law Ju
that a veterans preference hearing is required when an employee is placed on
medical leave of absence for a permanent disability. There was no attempt b
the employee in Myers to execute a voluntary resignation.

Indeed, in a case very similar to ours, in Seacrist v. Cottage Grove, 3 N.W.2d 889 (Minn. App. 1984), where a police officer resigned rather than fa disciplinary proceedings, the court held squarely that the employee voluntar quit his job. The court cites its earlier decision in Ramirez v. MWCC, 340 N.W.2d 355 (Minn. App. 1983):

> When an employee, in the face of allegations of misconduct, chooses to leave his employment rather than exercise his right to have the allegations determined, such action supports a finding that the employee voluntarily left his job without good cause. Board of County Commissioners v. Florida Department of Commerce, 370 So.2d 1209, 1211 (Fla. App. 1979).

The resignation in Petitioner's case is similar to the "purely voluntary" resignation for "personal reasons" in anticipation of a certain termination E. H. Schrupp and Associates v. Stansberry, 412 N.W.2d 808 (Minn. App. 1987)

The fact that an employee is faced with an inherently unpleasant situat or that his choice is limited to two unpleasant alternatives does not make t employee's decision any less voluntary as long as it is his decision and not that of the public employer. Covington v. Department of Health and Human Services, 750 F.2d 937. The employee who knowingly and voluntary resigns waives his rights to procedural protections that are otherwise provided at law. Scherer v. Davis, 543 F.Supp. 4, affirmed 710 F.2d 838. See, further Burch v. Rame, 676 F.Supp. 1218 (Police officer resignation not involuntary, even to avoid criminal prosecution) and Onnen v. U.S., 524 F.Supp. 1079 (Presumption of voluntariness).

HLK